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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SANTA CLARA

AT SAN JOSE

SAN JOSE POLICE OFFICERS' ASSOCIATION, Plaintiff, v. CITY OF SAN JOSÉ, BOARD OF ADMINISTRATION FOR POLICE AND FIRE DEPARTMENT RETIREMENT PLAN OF CITY OF SAN JOSE, and DOES 1-10, inclusive, Defendants.	Consolidated Case No. 1-12-CV-225926 [Consolidated with Case Nos. 1-12-CV-225928, 1-12-CV-226570, 1-12-CV-226574, 1-12-CV-227864, and 1-12-CV-233660] Assigned For All Purposes To: Judge Patricia Lucas Department 2 AFSCME LOCAL 101'S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR ATTORNEYS' FEES
AND RELATED CROSS-COMPLAINT AND CONSOLIDATED ACTIONS	Hearing Date: September 25, 2014 Hearing Time: 9:00 a.m. Courtroom: 2 Judge: Honorable Patricia Lucas Action Filed: June 6, 2012 Trial Date: July 22, 2013

I. INTRODUCTION

AFSCME Local 101 did not ask for this fight, nor did it initiate this lawsuit for its own benefit. Rather, it filed this action on July 5, 2012, a month after the City of San Jose had sued AFSCME in federal court, on June 5, 2012 (AFSCME RJN, Exhibit 1). The City sought offensive declaratory relief against AFSCME Local 101 for the right to impose drastic cuts on city employees' and retirees' pensions which, in its view, was authorized under Measure B. The City promoted Measure B and the electorate adopted it in a hastily-scheduled off-year election in which only a small minority of the electorate participated.

AFSCME Local 101 refused to place the destiny of California public employees in the hands of a federal judge with no authority to issue binding holdings of state law, and on that basis moved to dismiss the City's action against it . (*See* AFSCME RJN, Exh. 2). The basis of AFSCME's motion to dismiss the federal lawsuit was the right to forward state Constitutional claims that would result in precedent binding on state courts faced with equally-improvident local laws. The motion stated:

> As a case of first impression involving a novel and controversial local law, *it is important that any disposition of the issues presented establish precedent to guide the state courts in resolving similar future conflicts. Decisions issued by this Court or the Ninth Circuit Court of Appeals will have no stare decisis affect within the state court system.* This is because the state courts have not yet interpreted Measure B or the vested rights doctrine in the context of the amendments made by Measure B to the City's Federated Retirement System. Any interpretation adopted by a federal court will not bind the courts of the state…and a contrary decision by the state's appellate courts will - in fact - bind federals court with respect to matters of state law.

(RJN Exh. 2, (emphasis added). In the face of this motion and this Court's decision not to cede jurisdiction to the federal courts, the City dismissed its federal lawsuit against AFSCME, and filed a counter-claim against it in these proceedings. In the meantime, AFSCME filed suit in this court to establish as a matter of law that the constitutional rights of public employees may not be impaired simply because a minority of eligible voters wish it.

Although the City has been willing to pay its attorneys *millions* of dollars to prosecute and defend the improvident ballot measure, the City suggests it is against the public interest to award fees to the parties who have defended the state constitution and, importantly, a *fundamental* right guaranteed thereunder. Code of Civil Procedure section 1021.5 was enacted specifically because the

Legislature determined that there should be incentives to those who protect - willingly or not - their *own* constitutional rights when doing so confers a benefit on others.

There is not a single case involving an award of section 1021.5 fees where the litigant did not have an individual stake in the litigation: Rules of standing prohibit such an award being rendered. The City even claims it never intended to put in place the drastic changes contemplated by Measure B, rendering plaintiffs' victories only "hypothetical." The record speaks otherwise. It was the City that first filed suit to enforce Measure B: Why would it have done so if its measure provided merely "hypothetical" authority? And if Measure B's terms were so insignificant and *de minimis*, why did the law achieve national attention, discussed by the City Council and the Mayor in national publications, with media attending at every hearing and during the trial itself?

The City's contention that the Court's ruling is insignificant and did not achieve an important objective is contradicted by the City's own statements after the trial, in which the Mayor avowed to, and did, seek a statewide ballot initiative to *amend* the contracts clause of the state constitution in direct response to the court's ruling, stating in a press release:

> Unfortunately, the Judge's decision to invalidate certain portions of Measure B also highlights the fact that current California law provides cities, counties and other government agencies with very little flexibility in controlling their retirement costs. *That's why I believe that we need a constitutional amendment* that will empower government leaders to tackle their massive pension problems and negotiate fair and reasonable changes to employees' future pension benefits.

(Soroushian Decl., Exh. 5). Clearly the City's reaction indicates AFSCME achieved a substantial result and, indeed, the Mayor made good on his promise to seek to amend the Constitution in response. (AFSCME RJN, Exh 2).

II. ARGUMENT

A. This Case Vindicated Important Rights

The City clearly does not consider the rights of public employees to be fundamental or important. Yet this case presents claims founded on the contracts clause of the State Constitution. The enumerated right is contained in the article of California's constitution that declares various fundamental rights, and the right to be free from impairment of contract is nestled among many other fundamental rights, including freedom of speech, religion, association, ex-post facto laws, and many

others. (*See* Cal. Const. Art. 1). Courts recognize that pension and other post-employment benefits constitute "important" and "*fundamental* vested rights." (*California League of City Employee Associations v. Palos Verdes Library Dist.* (1978) 87 Cal.App.3d 135, 139 (Finding non-pension retirement benefits to be fundamental vested rights and noting: "in determining whether they are fundamental the court is to evaluate "the effect of it in human terms and the importance of it to the individual in the life situation."); *HRPT Properties Trust v. Lingle* (D. Hawaii 2010) 715 F.Supp.2d 1115, 1136 ("An impairment of a contract is substantial if it deprives a private party of an *important* right….") (emphases added).)

Necessarily, any local ordinance or charter amendment that impairs contracts will involve private interests. That fact does not detract from the public import of constitutional determinations involving the contract clause. Indeed, that is their nature: they vouchsafes individual rights. (*Star-Kist Foods, Inc. v. County of Los Angeles* (1986) 42 Cal.3d 1, 8 (in bank) ("Provisions like the Fourteenth Amendment *and the contract clause* confer *fundamental* rights on *individual* citizens.) (emphasis added).) Necessarily, fundamental constitutional rights are important.

The City attempts to turn the analysis on its head by stating, "The public interest was served by the savings and increased services generated by Measure B, not by the Plaintiff's attack on it."[1] However, as a matter of policy that issue has been decided against the City by the Court. The City presented much evidence regarding the City's necessity in adopting Measure B, and in finding provisions of Measure B invalid, the Court necessarily determined that Measure B's impairment of individual rights was "substantial" and not justified by any "important public purpose." (*Board of Admin. v. Wilson* (1997) 52 Cal.App.4th 1109, 1154 ("[A] substantial impairment may be constitutional if it is 'reasonable and necessary to serve an *important public purpose*.").) Thus by finding in favor of AFSCME, the court necessarily found that no "important public interest" was served by the impairments. The City may not re-argue the merits here.

Finally, the authorities the City cites do not assist its position. For example, the City conveniently omits from its description of *Pacific Legal Foundation v. California Coastal Com.,*

[1] City's Opposition Brief at 2:2-3. Again, it was the City that sued AFSCME, not the other way around.

(1982) 33 Cal.3d 158 (City Opp., p. 9:1-8 (quoting *Press v. Lucky Stores* (1983) 34 Cal.3d 311)), the key point which was not the nature of the right, but that the judgment affected only a single individual. (*Id.* ("the primary effect of the judgment in Pacific Legal Foundation was merely to invalidate a condition placed on a land use permit which encumbered the value of a single parcel of property ... only plaintiffs' personal economic interests were advanced by their lawsuit.").)

Likewise, the City takes *Young v. State Water Resource Bd.* (2013), 219 Cal.App.4th 397, 407, completely out of context. The issue presented was whether rate payers were entitled to participate in certain administrative proceedings convened by the Water Board. The Water Board permitted their intervention and participation, but the rate payers nevertheless pursued the issue on subsequent mandamus. (*Id*., 219 Cal.App.4th at 407) The Water Board did not oppose the rate payers argument regarding participation, and the central issue was the Board's jurisdiction, an issue on which the Board *prevailed* and petitioners were defeated. (*Id*.) The reason the court denied fees was because the petitioners had not obtained any concrete relief. The court noted, that "[i]t was the jurisdictional question that presented an issue of ongoing public importance, and if they had prevailed on that issue, there might have been grounds for an award of fees." (*Id*. at 407). The point for which the City cites *Young* is undermined by the case itself: A relatively small group with a strong financial interest in the litigation can support an award of fees under section 1021.5 if they obtain relief.

If the City's position were endorsed, virtually no contract impairment performed by a local government could give rise to a fees application under 1021.5, as such cases necessarily involve individual rights. That result lacks fealty to both the purpose and the language of section 1021.5.

B. AFSCME Conferred a "Significant Benefit" on "The General Public or a "Large Class of Persons"

Measure B affected tens of thousands of individuals, consisting of current city employees, deferred vested members, and retirees. AFSCME Local 101 consists of far fewer members. There are over 3,600 retirees under the Federated System, and 6,800 active employees of the City. (Exhs. 397, p. 209; 421, p. 123.) There are hundreds of inactive vested (or "deferred-vested") members and survivors. (Exh. 427.) With respect to the Federated system, Measure B affected more than ten thousand persons. (*Id*.) Because AFSCME Local 101 consists of far fewer members than this,

AFSCME and the other plaintiffs are carrying the mantle for thousands of unrepresented City workers and retirees. Indeed, no deferred-vested members of the public were involved in the lawsuit. These numbers far exceed the number of individuals sufficient to constitute "a large class of persons" as defined under section 1021.5. (*See, e.g., Monterey/Santa Cruz County Bldg. and Const. Trades* (2011) 191 Cal.App.4th 1500 (noting that "hundreds of construction workers" constituted a "large class of persons."); *c.f. Averill Superior Court* (1996) 42 Cal.App.4th 1170 (homeowner seeking to prevent a residence in her neighborhood from being converted into a battered women's shelter involved matter of public interest); *Foothills Townhome Assn. v. Christiansen* (1998) 65 Cal.App.4th 688, (suit by a homeowners association to recover an unpaid $1,300 assessment needed to replenish the association's capital reserves brought against a recalcitrant homeowner 'involved matters of sufficient public interest under CCP section 425.16."); *Damon v. Ocean Hills Journalism Club* (2000) 85 Cal.App.4th 468, 573 (public interest requirement satisfied under 425.16 in defamation action by manager of a residential community of 1,633 homes against members of the community who were critical of his performance).)

California courts also recognize that issues of "public interest" include "private conduct that impacts a broad segment of society and/or affects a community." (*Kurwa v. Harrington, Foxx, Dubrow, & Canter, LLP* (2007) 146 Cal.App.4th 841, 846; *Damon v. Ocean Hills Journalism Club* (2000) 85 Cal.App.4th 468, 479.) Here AFSCME's lawsuit affected more than a community and benefitted many individual members of the public.

The City's authorities, within which the City seeks to situate this case, are inapposite. In *Concerned Citizens v. La Habra*, (2005) 131 CA4th 336, *Center for Bio Diversity v. California Fish and Game Comm'n,*, 195 Cal.App.3d 213, and *King v. Lewis*, (1990) 219 CA3d 552, 556-57, the plaintiffs seeking fees did not obtain *any* substantive relief. The *La Habra* plaintiffs succeeded in obtaining a CEQA review of a construction project, but did not obtain affirmative relief or affect the ultimate outcome. In *King*, the plaintiffs achieved a technical change to the language of a ballot measure that "did nothing to significantly alter the meaning of the impartial analysis." (*Id.* at 556.). And in *Ctr. for Bio. Diversity v. Cal. Fish and Game Com.*, (2011) 195 Cal.App.4th 128, the superior court simply remanded ordering the commission to reconsider and apply a proper legal

standard (which it did and reached the identical result). Tellingly, *Ctr. for Bio. Diversity* includes the following statement: "*Karuk* was merely the latest of decisions holding that minor revisions or rewordings are not sufficiently significant to support an award under section 1021.5" (*Id*. at 141), which indicates that plaintiffs who obtain more than "minor re-wordings," may be awarded fees.

In each of the City's cited-to cases the plaintiffs obtained no substantive relief whatsoever. In order to place this case amongst those upon which it relies, the City contends that plaintiffs did not establish any tangible benefit and the Court's rulings was largely theoretical making no concrete difference. That is evidently not the case. Notably, the City's trial presentation was focused on the importance of Measure B to the City and the real "savings" the City predicted it would generate. At no point in the five days of trial, or in any of its pre-trial motions did the City suggest that these savings, and the importance of preserving Measure B's terms, were "hypothetical" or inconsequential.

Assuming, *arguendo*, that the ruling obtained by AFSCME did not involve substantive relief (it did), that does not affect AFSCME's entitlement to fees. "[T]he 'significant benefit' that will justify an attorney fee award need not represent a 'tangible' asset or a 'concrete' gain but, in some cases, may be recognized simply from the effectuation of a fundamental constitutional or statutory policy." (*Woodland Hills*, 23 Cal.3d at 939; *see also In re Adoption of Joshua S.* (2008) 42 Cal.App.4th 945, 958 ("The benefit may be conceptual or doctrinal," and "can involve … clarifying important constitutional principles").)

C. The City Misstates Consideration of the Union's "Financial Interest" in the Litigation

The City overstates to the point of misstating a so-called "pecuniary benefit" consideration in granting a fees award. Section 1021.5 clearly refers to a "significant benefit, whether pecuniary or nonpecuniary," conferred on a "large class of persons." That the Union may have an independent motivation for forwarding the suit is irrelevant. Most fundamentally, the City misstates the analysis by suggesting that AFSCME has a financial stake in the litigation. As summarized in *Robinson v. City of Chowchilla* (2011) 134 Cal.Rptr.3d 696, "The final step in the cost-benefit analysis used when considering a claim for attorney fees under the private attorney general doctrine is to compare the estimated *value* of the case to the actual cost and make a value judgment whether it is desirable to

encourage litigation of that sort by providing a bounty, *which is appropriate except where the expected value of the litigant's own monetary reward exceeds by a substantial margin the actual litigation costs*." (*Id*. (emphasis added); citing *Whitley v. Maldonado* (2010) 50 Cal.4th 1206, 1216, 117 Cal.Rptr.3d 342, 241 P.3d 840.) Here, there was no "monetary award." Rather, there was a declaration of existing rights that the City sought to curtail. It turns logic it on its head to suggest that the plaintiffs obtained a monetary or financial outcome when they reinstated the status quo and *preserved* constitutional rights for their members and thousands of others. It is this reason that the City's arguments regarding a "pecuniary" interest or outcome is misplaced.

D. Necessity and Financial Burden Support an Award of Fees under Section 1021.5

In arguing against an award of fees under the "burden" analysis, the City argues that AFSCME Local 101 is equivalent to two statewide associations, the California Teachers Association ("CTA") and the California Redevelopment Association. The latter is composed of thousands of businesses, and the other composed of hundreds of thousands of teachers. They dwarf AFSCME in both size and resources (which is comprised of City employees in select bargaining units).

The City forgets, however, that it sued AFSCME first. In assessing the "necessity" and "financial burden" the courts looks to proportionality or recovery and fees expended in relation to the plaintiff's ability to pay. Here, AFSCME did not recover monetarily. In addition, AFSCME Local 101 is a small union consisting of city employees in select bargaining units, it is no goliath.

In *Cory*, as cited by the City (City Opp., p. 14), fees were not awarded because of the "large sums in issue" (hundreds of millions of dollars) as the "magnitude" of the benefit did not outweigh the burden on the CTA, a large statewide union, and the court took pains to emphasize was a ruling under the "*unique circumstances*" presented in that case. (*Cory*, 155 Cal.App.3d at 515 (emphasis added).) Similarly, in *CRA v. Matosantos*, 212 Cal.App.4th 1468, the plaintiff was a membership association of statewide California businesses, and the court determined the outcome was not disproportionate to CRA's benefit or resources.

The two outlier decisions relied on by the City, *Matosantos* and *Cory*, are unique to their facts, and in neither case were the litigants forced into litigation by the public agency, as was the case here. Prior to any litigation involving Measure B, AFSCME pursued and continues to pursue

administrative challenges to Measure B before the Public Employee Relations Board, which is the appropriate venue for resolving disputes between public employers and the employees' unions.

The City's misplaced reliance on *Cory* and *Montasantos* is revealed by *Plumbers and Steamfitters, Local 290 v. Duncan* (2007) 157 Cal.App.4th 1083. In that case a union successfully challenged a decision by Director of the Department of Industrial Relations, which held that private plumbing contractor's renovation of privately owned building leased in part to county was not a public works project under prevailing wage law. (The significance of public works designation is that union prevailing wages must be paid on the job). The court found the union was entitled to attorney fees under section 1021.5 because the enforcement of the prevailing wage law affected the public interest in that it was likely to affect other projects in future, and financial burden of litigation was disproportionate to union's interests in action.

E. AFSCME was a Successful Party and Obtained Tangible Benefits [2]

As noted herein, the City brought suit against AFSCME. AFSCME did not 'choose this fight.' Section 1021.5 applies to any "prevailing party" and not simply to plaintiffs. Of course, once the City dismissed its federal action and counter-claimed against AFSCME in these proceedings, it became a cross-plaintiff. With respect to the City's cross-complaint, the court declined to grant relief (but nevertheless AFSCME was required to defend them through trial).

Here, AFSCME is a prevailing party because it "succeed[ed] on … significant issue[s] … achiev[ing] some of the benefit [it] sought in bringing suit." (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1282 ("*Maria P.*"); *see also RiverWatch v. San Diego Dept. of Environ. Health*, 175 CA4th 768, 782-83 (2009) ("The party seeking attorney fees need not prevail on all its claims alleged in order to qualify for an award.").)[3] Measure B served two primary purposes: reducing its employees'

[2] Whether a party is a "successful party" for attorneys' fees under section 1021.5 does not depend on whether the party is one for costs purposes. Courts may grant one but not the other. (*See, e.g., Galan v. Wolfriver Holding Corp.* (2000) 80 Cal.App.4th 1124.)

[3] The City's citation to *Ebbets Pass Forest Watch v. Cal. Dept. of Forestry and Fire Prot.* (2010) 187 Cal.App.4th 376 does not change the outcome here. In that case, the plaintiffs did not have a "factually meritorious lawsuit" and were not actually successfully in their pursuit of the case. "[T]heir only victory was in a statement of law that when applied to the record clarified why they should lose." (*Id.* at 388.) Furthermore, in *Marine Forests Soc'y v. Cal. Coastal Comm'n* (2008) 160 Cal.App.4th 867, the moving party did not achieve its primary objective of preserving an artificial reef. Here, in contrast, the court actually invalidated parts of Measure B.

pension benefits and reducing other post-employment benefits, such as retiree health. Notably, a primary goal of AFSCME was to restore its members' pension benefits (including the COLA) to the *status quo ante* level existing prior to the passage of Measure B. (Soroushian Decl. ¶8, Exh. 4 (¶ 3-4, 14, 31, 32, 36-42, 50-55, 60-70.)) AFSCME successfully did this and is therefore a successful party.

Importantly, AFSCME defeated Section 1506-A, Measure B's centerpiece, which would have required members to pay up to 16% of pensionable pay towards UALs; the fact that the Court upheld Section 1514-A (permitting pay cuts up to 16% of compensation in accordance with the applicable law) does not minimize that victory. Although the City took the position that the pay reductions were self-executing, the court's ruling clarifies that Section 1514-A is not 'self-executing' and requires further action despite the City's, *i.e.,* it must be bargained in accordance with the MMBA.[4]

AFSCME's defeat of Section 1507-A (VEP) also supports "successful party" status. The City argues that this was not a separate victory because the Court tied the invalidity of the VEP to that of Section 1507-A. However, this is a distinction without a difference as courts still reward fees when they grant relief regardless of *why* they do so. (*See Maria P., supra,* 43 Cal.3d 1281, 1291; *Wal-Mart v. City Council* (2005) 132 Cal.App.4th 614, 621-22 (successful party status warranted even though petition denied on procedural rather than substantive grounds).) In that regard the City grasps at straws where it states that, with respect to the VEP, the Court's ruling is insignificant because the IRS has not yet blessed the VEP. If that were the case, why did the City sue AFSCME to enforce the provision in the first place? The City therefore has essentially admitted to wasting the court's time, improperly putting AFSCME "through its paces" for no good reason, and wasting millions of dollars in public funds by doing so. In any event, the IRS has not ruled one way or the other. Even if IRS approval is not imminent, there is potential for it. (*Ctr. for Bio. Diversity v. Cal. Fish & Game Com.* (2011) 195 Cal.App.4th 128 (significant benefit achieved may be "conceptual or doctrinal, and need

[4] This point is significant, as a recent appellate case issued since this court issued its judgment found a city charter provision pre-empted by the MMBA to the extent it required a vote of affected employees before changes could be made to retiree health contributions. (*Dailey v. San Diego* (2013) 223 Cal.App.4th 237, 254-55.) Similarly here, a right on the part of the City to make unilateral changes to compensation conflicts with, and is preempted by, the MMBA, which obligates the parties to bargain over any changes to compensation.

not be actual and concrete....").) Because the IRS has not issued a decision, the court's ruling renders the IRS' eventual determination moot, and not the other way around.

The City trivializes AFSMCE's defeat of Section 1510-A (COLA) by claiming that it continues to hold constitutional authority to withhold COLA benefits, a power it retains with or without Measure B. That is not a correct statement of law, and Section 1510-A granted the City COLA-suspension powers far in excess of is constitutionally permissible. Because AFSCME's challenge to Section 1510-A was facial indicates the infirmity of the provision, and courts award Section 1021.5 fees to plaintiffs prevailing on facial challenges. (*See, e.g., Northwest Energetic Services, LLC v. California Franchise Tax Bd.* (2008) 159 Cal.App.4th 841.)

Finally, while the City claims that AFSCME achieved no success with respect to the retiree health provision of Measure B, that is untrue, as the Court's ruling ensures the City makes a commensurate 50% contribution to the plan. The distinction is highly significant to retirement system members, since Measure B turned what had been a ceiling for contributions into a floor.

Because AFSCME's challenges were overwhelmingly facial and the City's suit was denied in full, the City is incorrect when it states that it achieved "some of its goals." Most of Measure B has yet to be implemented, and once it is, as-applied challenges will be ripe and may be mounted. Thus, the City achieved very little in its lawsuit. AFSCME, on the other hand, succeeded in ensuring that key portions of Measure B *may never be* implemented because they are facially unconstitutional.

Perhaps the most significant victory was with respect to the Reservation of Rights Clause ("Clause") argument. The City argued that the Clause prevented vesting of rights at all; if it prevailed on that contention, benefits would be entirely ephemeral. That ruling alone warrants fees.

III. CONCLUSION

For these and those set forth by the other plaintiffs, the motion should be granted.

Dated: September 17, 2014

BEESON, TAYER & BODINE, APC

By: _____
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PROOF OF SERVICE

SANTA CLARA SUPERIOR COURT

I declare that I am employed in the County of Alameda, State of California. I am over the age of eighteen (18) years and not a party to the within cause. My business address is Beeson, Tayer & Bodine, Ross House, Suite 200, 483 Ninth Street, Oakland, California, 94607-4051. On this day, I served the foregoing Document(s):

PLAINTIFF AFSCME LOCAL 101'S REPLY TO THE CITY OF SAN JOSE'S OPPOSITION TO MOTION FOR FEES AWARD

☒ **By Mail** to the parties in said action, as addressed below, in accordance with Code of Civil Procedure §1013(a), by placing a true copy thereof enclosed in a sealed envelope in a designated area for outgoing mail, addressed as set forth below. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

☒ **By Electronic Service.** Based on a court order or an agreement of the parties to accept service by electronic transmission, I caused the documents to be sent to the persons at the electronic notification addresses listed below. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

SEE SERVICE LIST

I declare under penalty of perjury that the foregoing is true and correct. Executed in Oakland, California, on this date, September 18, 2014.

Esther Aviva

SERVICE LIST

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